WILKINSON) BARKER) KNAUER) LLP

2300 N STREET, NW
SUITE 700
WASHINGTON, DC 20037
TEL 202.783.4141
FAX 202.783.5851
www.wbklaw.com
KATHRYN A. ZACHEM
202.383.3344
kzachem@wbklaw.com

January 16, 2004

VIA ELECTRONIC FILING
Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Notice of Ex Parte Presentation -- CC Docket Nos. 96-262, 01-92*

Dear Ms. Dortch:

On January 13, 2004, John Thorne, Senior Vice President and Deputy General Counsel, Verizon Communications; R. Michael Senkowski and Helgi C. Walker of Wiley Rein & Fielding, and Kenneth D. Patrich and the undersigned of this firm, all on behalf of Verizon Wireless, met to discuss the above-referenced dockets with John Rogovin, General Counsel, and the following members of the General Counsel's Office: Linda Kinney, Jeffrey Dygert, Debra Weiner, Paula Silberthau, John Stanley, Victoria Schlessinger, and Laurence Bourne. In the meeting, we discussed the attached "White Paper on CMRS/CLEC Intercarrier Compensation," which was distributed to the attendees.

In conformance with the Commission's ex parte rules, this document is being filed electronically in the above-referenced dockets. Please direct any questions regarding this filing to the undersigned.

Sincerely yours,

/s/

Kathryn A. Zachem

cc:	John Rogovin	Paula Silberthau
	Linda Kinney	John Stanley
	Jeffrey Dygert	Victoria Schlessinger
	Debra Weiner	Laurence Bourne

WHITE PAPER ON CMRS/CLEC INTERCARRIER COMPENSATION

January 14, 2004

Prepared by

Wiley Rein & Fielding LLP

for Verizon Wireless

TABLE OF CONTENTS

Page

SUMMARY

Now pending before the Commission are two potentially interrelated requests for action regarding the intercarrier compensation regime. The first, a petition for declaratory ruling submitted by US LEC Corporation, seeks a ruling affirming the permissibility of the joint provision of access by a CLEC and a CMRS provider. The second is a petition for clarification or reconsideration filed by Qwest that asks the Commission to modify the *Seventh Report and Order* in the Access Reform Docket to require a CLEC to offset against its access charges any charges imposed by an ILEC for the provision of access to an IXC. Taken together, these petitions pose the broad question whether and how the FCC's current access charge regime applies to the provision of joint access services by CLECs and other carriers – in one case, CMRS providers, and in the other, ILECs – when each of them provides at least part of the access services necessary for an end user to originate or terminate a long distance call.

The Commission has long held that *all* providers of local exchange services and exchange access are entitled to compensation – whether by federal regulatory mandate or the enforcement of private contractual rights – for originating and terminating long distance calls. ILECs, CLECs, and CMRS providers, however, are subject to widely divergent regulatory regimes for such access charges. From the start, the access charge system for ILECs has been a highly reticulated one, recognizing that ILECs made a large historical investment in the national telephone infrastructure yet offered low-price local calling that was supported by the use of local networks for originating and terminating calls by the long distance carriers. By contrast, the rates and rate structures for CLEC access charges, based more on current rather than historical costs, have been largely unregulated. In the *Seventh Report and Order*, the Commission created a limited exception to that general *laissez faire* approach by adopting presumptively lawful

benchmark rates for traffic originated and terminated by CLECs, including 8YY traffic, and specifically declined to mandate any access rate structure for CLECs. While access charges for CMRS providers were detariffed in 1994, the Commission repeatedly has made clear that they are free to recover compensation for the provision of access through market-based agreements and that nothing in the Commission's rules or policies prohibits such recovery.

The *Seventh Report and Order* set benchmarks for CLEC access charges, as noted above, but it did *not* speak to the issue of charges for jointly provided access involving CLECs and other exchange access providers. As a result, it never set forth any benchmark rates for individual elements of access, nor prescribed any rules regarding billing or division of access charges when CLECs provide those services jointly with another carrier. Given the animating purpose of the entire benchmark regime in the *Seventh Report and Order* – to fashion a *comprehensive* standard for the "reasonableness" of CLEC access charges – that document must be read to mean that the benchmark rate applied unless the Commission said otherwise. And while the Commission exempted certain categories of CLEC access charges, it never did so with respect to jointly provisioned access. Similarly, the Commission has never regulated the terms and conditions of CMRS agreements to recover access charges. To the contrary, it has *approved* CMRS participation in joint access arrangements and *expressly acknowledged* the existence of CMRS-LEC joint access arrangements without suggesting that they were in any way improper.

In reliance on this state of federal regulatory law – and beginning years before the *Seventh Report and Order* was released – a number of CLECs and CMRS carriers reasonably and in good faith have entered into contracts for the joint provision of access for toll free long distance calls ("8YY" traffic) originating with CMRS end users. These arrangements – which serve legitimate business ends by ensuring the efficient transport and routing of 8YY traffic, and advance the public interest in supporting the development of new entrants in the local exchange market – are now widespread in the industry. Significant dollar amounts are at stake in these 8YY contracts. Until the recent filing of a lawsuit against US LEC, no party had questioned the propriety of market-based agreements between CLECs and CMRS carriers to jointly provision access, or of the CLEC's collection of the Commission-approved rate for the provision of such access.

Thus, the instant petitions seek to overturn, with potentially drastic results for carriers, past industry conduct – conduct that the Commission clearly permitted by making the CLEC benchmark applicable to all CLEC access charges, including 8YY traffic, and that it *certainly* never prohibited. For the reasons discussed in Part I of this White Paper, joint provisioning agreements between CLECs and CMRS carriers are entirely lawful under the current CLEC access charge regime and should be permitted as a matter of policy.

In any event, should the Commission decide to ban or limit CLEC-CMRS agreements on joint access, fundamental principles of statutory and constitutional law require it to limit its ruling to purely prospective effect, as explained in Part II. Any other approach would upset the finality of charges assessed long ago under filed CLEC tariffs; unfairly punish both CLECs and CMRS carriers who never received any fair notice that joint provisioning/single billing arrangements might be unlawful; wrongly apply a brand new federal prohibition to past conduct, which was permitted under the *Seventh Report and Order*; improperly result in the retroactive invalidation of contracts, legal when executed; and provide IXCs with a windfall, as they have already recovered the costs of access through their profitable rates for 8YY service.

Failure to clearly specify the exclusively prospective nature of any decision to regulate CLEC/CMRS access agreements would spawn costly litigation to reset the rate for historically provided services, improperly enmeshing the courts in the business of retrospective ratemaking, and inundating the Commission with complaints attacking the lawfulness of past charges. If the benchmark rate does not apply in this context, the CLEC and CMRS carrier nonetheless are entitled to some amount of compensation for the access services provided, and no one in either the US LEC or Qwest proceeding has claimed that the price for those services is zero. And even if a long distance carrier succeeded in achieving a refund of filed rates, that would not be the end of the matter: that carrier's own customers for 8YY service might bring a class action or file a Commission complaint claiming that they were entitled to a pass-through of the refund. In short, once respect for filed tariffs is breached, there will be no stopping. A decision to retroactively impose a new regulatory regime on CLECs and CMRS providers therefore would be both unlawful and unwise.

DISCUSSION

I. JOINT ACCESS ARRANGEMENTS BETWEEN CLECS AND CMRS CARRIERS TO RECOVER THE COST OF ACCESS SERVICES PROVIDED TO IXCS ARE LAWFUL AND SHOULD BE PERMITTED.

In its petition for a declaratory ruling, US LEC asks the Commission to "issue a ruling reaffirming that LECs are entitled to recover access charges from IXCs for the provision of access service on interexchange calls originating from, or terminating on, the networks of CMRS providers."[1] The Commission should grant that request and specify that joint billing arrangements between CLECs and CMRS carriers to recover the costs of access services provided to IXCs are and always have been permitted.

[1] *See* Petition of US LEC Corp. for Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic, CC Docket No. 01-92, at ii (filed Sept. 18, 2002) ("US LEC Petition").

A. **<u>The Commission Has Long Approved Revenue-Sharing Arrangements Involving All Forms Of Exchange Access Providers.</u>**

In its rules and policies, the Commission has long recognized revenue-sharing arrangements for access charges as an appropriate mechanism to simplify billing relationships and to avoid complicated multi-carrier agreements – including agreements between LECs and CMRS carriers. For example, in 1987 the FCC found that "billing accuracy" and "customer convenience" were best served when IXCs received one bill for services jointly provided by two LECs.[2] Although the FCC did not mandate joint billing, it expressly encouraged the use of a single bill and the sharing of revenues via an access sharing agreement for "meet point billing."[3]

Since then, the FCC has repeatedly affirmed not just the validity but indeed the desirability of single billing arrangements for the provision of access services that are facilitated by more than one carrier. In 1995, the FCC approved the joint provision of access pursuant to ATIS's MECAB standards, including the "single-bill, single-tariff" arrangement.[4] Those standards specifically contemplate joint provision of access by all LECs (including CLECs) and CMRS providers. They expressly permit a carrier to "prepare a single access or interconnection bill" under which a "customer remits payment" to the carrier and the carrier "remits payment to the other providers."[5] The standards further establish that the term "LEC" – i.e., a "Company

---

[2] *See Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, 2 FCC Rcd 4518, 4521 (1987) (Memorandum Opinion and Order).

[3] *Id*. at 4518. "Meet point billing is a method for the joint provision of access service through multiple company ordering and billing arrangements." *Id.*

[4] *Elkhart Tel. Co. v. Southwestern Bell Tel. Co.*, 11 FCC Rcd 1051, 1055 (1995).

[5] *ATIS/OBF MECAB-007*, at 4-3 (Feb. 2001).

providing local telephone service" – includes a "Wireless Service Provider," "which includes CMRS."[6]

In addition, a 1999 Commission order concerning intercarrier compensation for ISP-bound traffic stated:

> Generally speaking, when a call is completed by two (or more) interconnecting carriers, the carriers are compensated for carrying that traffic through either reciprocal compensation or access charges. When two carriers jointly provide interstate access (e.g., by delivering a call to an interexchange carrier (IXC)), *the carriers will share access revenues received from the interstate service provider*.[7]

Indeed, the Commission has sanctioned the precise arrangements at issue in this matter. As recently as 1996, the Commission "invite[d] CMRS providers and LECs to describe existing arrangements under which CMRS providers are compensated for originating and terminating interstate interexchange traffic that transits a LEC's network."[8] It also inquired about "contracts between LECs and CMRS providers" "comparable" to those "between neighboring LECs establishing joint arrangements for providing interstate access," asking whether such contracts should be publicly filed.[9] The Commission thereby acknowledged that LECs and CMRS carriers have entered into joint access arrangements, without suggesting that such contracts are in any way improper.

---

[6] *Id.* at 1-1.

[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, 3695 (1999) (Declaratory Ruling) (emphasis added).

[8] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5075 (1996).

[9] *Id.*

Thus, the sharing of revenues for access services provided by two carriers – as a matter of their own business choice – is an established and legitimate practice that the Commission has recognized as a public interest good. It certainly has never discouraged such a practice.

B. <u>CMRS Carriers Are Providers Of "Exchange Access" And Thus Are Owed Compensation For The Provision Of Such Service.</u>

The Communications Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[10] As the Commission has expressly recognized, "CMRS providers," like LECs, "offer telephone exchange service and exchange access."[11] When a customer of a CMRS carrier places an 8YY call, the CMRS carrier provides via radio frequency spectrum the "local loop" portion of the call, switching, and transport elements of originating access. A LEC then performs a query of the 800 database to determine which carrier should next receive the call and, in turn, hands it off to an IXC and eventually a LEC for final delivery. In this scenario, there is no doubt that the CMRS carrier is providing "exchange access" to the IXC and is incurring incremental costs to do so. Of course, without the CMRS carrier's provisioning of originating access, the IXC would not be able to offer its customers 8YY services to the over 100 million wireless customers in this country.

Because CMRS providers offering exchange access provide a valuable service to other carriers and their customers – service that enables IXCs to charge up to 10 cents per MOU or more for incoming 8YY traffic[12] – they are entitled to compensation for that service even outside a joint billing arrangement. And nothing in the Commission's rules prohibits CMRS carriers

---

[10] 47 U.S.C. § 153(16).

[11] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15,499, 15,517 (1996); *see also id*. at 15,995-96.

[12] *See infra* note 71 and accompanying text.

from entering into joint billing arrangements with other carriers.[13] Rather, the Commission has approved division-of-revenue agreements as a wholly appropriate method for CMRS providers to receive compensation for access services.[14]

C. **<u>The *Seventh Report And Order* Made Clear That The Benchmark Applied Broadly To CLEC Access Charges, Including Those For 8YY Traffic, And Neither Required CLECs To Bill Only For The Access Elements They Provide Nor Limited The Applicability Of Tariffed Access Charges To Any Particular Class Of End-Users.</u>**

In its *Seventh Report and Order*, the Commission undertook a comprehensive reform of CLEC access charges.[15] Motivated by a concern that those charges were too high, the FCC established a limit on the rate that CLECs could tariff for their access charges.[16] The limit was initially keyed to averages of then-existing CLEC access rates but is designed to gradually decrease until it reaches ILEC access rates.[17] This benchmark rate was expressly made applicable to all originating and terminating traffic, including 8YY traffic.[18] The *Seventh Report and Order*, however, nowhere limits CLECs to charges for the particular rate elements that the

---

[13] While the Commission in 1994 decided to "temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service," *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1480 (1994), nothing in that order prohibits CMRS carriers from entering into provisioning agreements with entities that *do* operate under a tariff regime. Thus, the arrangements at issue here cannot be said to "circumvent" in any way the Commission's decision to forbear from allowing CMRS providers to file tariffs.

[14] *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd 2910, 2915 (1987) ("*Cellular Interconnection Order*") ("Cellular carriers and telephone companies are equally entitled to just and reasonable compensation for their provision of access, whether through tariff or by a division of revenues agreement."); *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, 9 FCC Rcd 5408, 5447 (1994) ("*CMRS Equal Access NPRM*") (noting, despite intervening decision to forbear from CMRS tariff rules, that "cellular carriers are entitled to just and reasonable compensation for their provision of access" (citing *Cellular Interconnection Order*, 2 FCC Rcd at 2915)).

[15] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (2001) ("*Seventh Report and Order*").

[16] *Id.* at 9924-25.

[17] *Id.* at 9943, 9945-46.

[18] *Id.* at 9946.

CLEC provides,[19] nor does it in any way restrict the ability of the CLECs to price the elements that they do provide, or to provide access jointly with other carriers. Indeed, any other reading of the *Seventh Report and Order* would run counter to the basic regulatory scheme that the Commission adopted therein. Furthermore, nothing in the *Seventh Report and Order* limits the applicability of a CLEC's tariffed access charges in qualifying markets to any particular class of end users.

1. The *Seventh Report And Order* Establishes A "Safe Harbor" For Rates That Specifically Applies To 8YY Traffic

In order to strike a balance between regulatory flexibility and eliminating the possibility of inflated CLEC access charge rates, the FCC adopted a straightforward regulatory scheme: the *Seventh Report and Order* creates a "safe harbor" for tariffed CLEC access charge rates.[20] The safe harbor provides that access rates below a certain level "will be conclusively presumed to be just and reasonable."[21] If CLECs wish to charge rates higher than the safe harbor amount, they may do so only by entering into contracts with the IXCs; rates in excess of the benchmark are thus mandatorily detariffed.[22] The benchmark rate, the Commission specified, was fully applicable to "both originating and terminating access charges, including to toll-free 8YY traffic."[23] In adopting this approach, the Commission "recognize[d] the attraction of a tariffed

[19] The fact that Qwest filed a "Petition for Clarification Or, In the Alternative, Reconsideration" asking the Commission to reach this conclusion is persuasive evidence that the *Seventh Report and Order* does not itself reach this result. *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Petition for Clarification Or, In the Alternative, Reconsideration at 2-3 (filed Aug. 7, 2001) ("some CLECs may interpret the *Order* to allow them to tariff their access rates at the ILEC's total switched access rate, even if the CLEC is not providing all the access services necessary to originate or terminate long distance traffic").

[20] *Seventh Report and Order*, 16 FCC Rcd at 9938-39.

[21] *Id.*

[22] *Id.*

[23] *Id*. at 9946.

regime because it permits CLECs to file the terms on which they will provide service and to know that, absent some contrary, negotiated agreement, any IXC that received the access service is bound to pay the tariffed rates."[24] IXCs, for their part, "will know that, *whatever the source* or destination of their access traffic, they will be assured a rate that is within the benchmark zone of reasonableness" or which they have negotiated.[25]

2. The *Seventh Report And Order* Was Designed As A Comprehensive Approach To The Matter of CLEC Access Charges.

The Commission's principal goal in adopting the benchmark rate described above was to establish a comprehensive solution to CLEC access charges and thus to provide "critical stability"[26] for long distance and exchange access markets – a rationale suggesting that the benchmark rate fully applies to CLECs, regardless of which elements of access they themselves provide or what sort of end-users are being served. Adopting a "bright line" rule, the Commission recognized, promotes the value of uniformity in the setting of rates.[27] Such a rule thus avoids the need for piecemeal, case-by-case adjudications as to the reasonableness of a given rate.[28] We are aware of only one exception to the Commission's "bright line" rule that the

[24] *Id*. at 9940.

[25] *Id.* (emphasis added).

[26] *Id*.

[27] *See id*. at 9939 ("Such a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of 'reasonableness.'").

[28] *See id*. at 9933 ("We are concerned that a flood of unreasonable-rate complaints could overtax the Commission's resources to deal with such proceedings in a manner that is timely and efficient yet gives each complaint the attention it deserves.").

benchmark rate applies to *all* CLEC access charges: the Commission authorized rural CLECs to charge fees higher than the benchmark rate.[29]

The Commission's dual decisions to implement a comprehensive scheme for CLEC access charges, and to establish a single exception to that system, compel the conclusion that the benchmark rate fully applies to CLECs that have entered into joint access agreements. When the Commission meant to carve out a certain category of CLEC access charges from the otherwise applicable benchmark, it said so expressly. It has not done so here. Accordingly, given the Commission's express purpose of setting a unified standard for CLEC access charges that would apply broadly to all circumstances unless the Commission exempted certain categories of fees, it is clear that the benchmark rate of the *Seventh Report and Order* fully applies to CMRS/CLEC access agreements. Any conclusion that the benchmark does not cover CMRS-CLEC joint service arrangements would produce precisely the harms the Commission created the benchmark to avoid – a rash of complaints that taxes Commission resources and occasions uncertainty in the telecommunications industry – and thus resurrect the "persistent concerns over the reasonableness of CLEC access charges" that the Commission sought to extinguish.[30]

3. The *Seventh Report And Order* Specifically Declined To Set Rates For Individual Elements.

As explained above, the purpose of the safe harbor system was to avoid excessive regulatory entanglement with CLEC rates. As a result, the *Seventh Report and Order* steered well clear of establishing rates for individual access elements provided by CLECs.

---

[29] *See id*. at 9949-56; *see also id.* at 9944 (explaining that "[o]n the effective date of the rules we promulgate today, CLECs will be permitted (subject to a rural exemption . . .) to tariff their access rates" at the benchmark in those markets where they are eligible to do so).

[30] *Id.* at 9940.

The Commission was careful to emphasize throughout the *Seventh Report and Order* that it sought "to preserve the flexibility which CLECs currently enjoy in setting their access rates."[31] The *Order* did "not intend to restrict CLECs to tariffing solely the per minute rate that a particular ILEC charges for its switched, interstate access service."[32] Rather,

> *in contrast to our regulation of incumbent LECs*, our benchmark rate for CLEC switched access does *not require any particular rate elements or rate structure*; for example, it does not dictate whether a CLEC must use flat-rate charges or per-minute charges, *so long as the composite rate does not exceed the benchmark*.[33]

The Commission's clear intent thus was to give CLECs a free hand in designing their access charge rates, and even the structure of the access charges themselves, so long as the overall rate charged was below the declining benchmark established by the FCC. "CLECs should be permitted to set the combined level of their access charges, for all the consumers of the service, as they please."[34]

Because the *Order* does not set benchmark rates for specific components of access, and does not mandate any level of granularity in setting prices, a CLEC need not price its individual rate elements in such a way that, combined, they reach the benchmark rate. Instead, a CLEC could decide that each individual component of its access charges, when provided individually in the context of joint provisioning, would be priced at the benchmark rate. This is also true of access charges for 8YY calls, as the *Seventh Report and Order* made explicit that the benchmark

---

[31] *Id.* at 9946.

[32] *Id.* at 9945.

[33] *Id*. at 9946 (emphasis added).

[34] *Id.* at 9938.

rate fully applies to 8YY traffic.[35] Under this pricing structure, the CLEC could charge the benchmark rate for providing switching alone, for providing transport alone, or for providing transport and switching together.

In light of the broad flexibility and regulatory simplicity that the Commission sought to achieve with the *Seventh Report and Order*, an interpretation of the *Order* that required CLECs to offset their rates by the costs of individual ILEC rate elements would make little sense. Adopting this type of offset requirement would undermine the FCC's "reluctan[ce] to impose . . . legacy regulation on new competitive carriers."[36] It would also create a *de facto* requirement that CLECs adopt rate structures similar or identical to those contained in Part 69, thus imposing ILEC rate regulation on CLECs through the back door. This strained interpretation contradicts the underlying assumptions of the *Order* itself and therefore cannot be characterized as a reasonable interpretation of the *Seventh Report and Order*. Moreover, it would require the Commission to promulgate new rules either benchmarking particular elements of CLEC-provided access to the Part 69 Rules for ILEC elements.

Similarly, a broad prohibition on sharing access rates with other carriers is not supported by either the language or the logic of the *Seventh Report and Order*. Nowhere does the *Order* suggest that the Commission was contemplating this type of prohibition, and such a restriction would be antithetical to the general deregulatory regime adopted in the *Order.*[37] As with ILEC

---

[35] *Id.* at 9946 (explaining that the Commission would "apply the benchmark for both originating and terminating access" – i.e., that the benchmark "will apply to tariffs for both categories of service, *including toll-free, 8YY traffic*" (emphasis added)).

[36] *Id.* at 9939.

[37] Neither the NPRM nor FCC requests for additional comment put CLECs or CMRS carriers on fair notice that the FCC would use this proceeding to issue new rules regarding the joint provisioning of access by CLECs and other carriers. *See Common Carrier Bureau Seeks Additional Comment on Issues Relating to CLEC Access Charge Reform, Public Notice*, 15 FCC Rcd. 24,102 (2000); *Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing CLEC Interstate Access Services, Public Notice*, 15 FCC Rcd 10,182 (2000); *Access Charge*

offsets, an interpretation that is not implicitly or explicitly set forth in the *Order*, and that goes against the underlying purpose of the regime adopted in the *Order*, cannot be what the *Order* clearly intended. Indeed, it was well known to the Commission at the time of the *Seventh Report and Order* that many CLECs were not directly interconnected with IXCs and were jointly providing access services with other LECs. And yet the *Order* nowhere addresses itself to this fact, let alone purports to place new restrictions on joint provisioning.

4. The *Seventh Report And Order* Does Not Prohibit CLECs From Sharing Revenues Gained From 8YY Traffic.

The *Seventh Report and Order* establishes a number of CLEC access charge guidelines. Although the *Order* made clear that the benchmark rate applies to 8YY traffic,[38] the Commission expressly declined to resolve certain other issues regarding CLEC aggregation of originating 8YY traffic.[39] The Commission decided that it did not have sufficient evidence to decide these issues and thus through public notice and comment sought input on 8YY concerns – including the question whether CLECs should be barred from sharing 8YY revenues with entities that aggregate 8YY traffic.[40]

In particular, citing "the paucity of record evidence" on the issue, the Commission solicited comments on, among other matters, whether "the Commission should attempt to

---

Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14,221 (1999). Because the FCC never gave proper notice that it was considering a broad restriction on the joint provisioning of access by CLECs and CMRS carriers, it cannot adopt such a prohibition in this docket. *See* 5 U.S.C. § 553(b) (2000) (requiring "general notice" in rulemakings of "either the terms or substance of the proposed rule or a description of the subjects and issues involved"). Nor can the Commission use the backdoor of reconsideration or clarification to adopt a new rule that was never properly part of this docket. *See Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

[38] *See Seventh Report and Order*, 16 FCC Rcd at 9946 (explaining that the Commission would "apply the benchmark for both originating and terminating access" – i.e., that the benchmark "will apply to tariffs for both categories of service, *including toll-free, 8YY traffic*" (emphasis added)).

[39] *See, e.g.*, *Seventh Report and Order*, 16 FCC Rcd at 9946 n.128; *id*. at 9961-64.

[40] *Id.* at 9961-64.

address [8YY revenue sharing arrangements] through a rulemaking," or whether IXCs should be "left to address specific instances of abuse directly with the relevant CLEC."[41] In fact, the Commission specifically made reference to situations where the CLEC was carrying 8YY traffic that was not originated by its own end-user customers, and indicated that it needed to develop a further record with regard to such traffic.[42] That rulemaking remains pending; thus, the benchmark continues to apply. Accordingly, even if some form of offset or prohibition on revenue sharing could be justified under the basic holding of the *Seventh Report and Order*, such a holding could not be extended to 8YY traffic.

5. CLEC And CMRS Agreements On Joint Access Provision Comport With Commission Precedent.

As just explained, private contractual arrangements between CLECs and CMRS carriers to share access charges associated with wireless subscribers' originating 8YY traffic are perfectly consistent with FCC precedent. The Commission's *Bell Atlantic* decisions are not to the contrary. In those cases, the FCC determined that Part 69 carriers cannot assess and keep common line or end user charges for that portion of the telephone network that connects an ILEC with a CMRS carrier.[43] It does not follow from that premise, however, that CLECs are forbidden from imposing access charges for the provision of access with respect to CMRS traffic. These decisions did not address joint billing relationships at all. There, the ILEC sought to retain the

---

[41] *Id*. at 9962.

[42] *See id*. at 9963 (discussing situations where "a CLEC carries an end user's 8YY traffic without also providing that end user with local exchange service or other types of access service," and inquiring whether the Commission "would be justified in immediately tying 8YY access tariffs to the ILEC rate for all CLECs, regardless of the services that they provide to their end users").

[43] *See Texcom, Inc. v. Bell Atlantic Corp.*, 16 FCC Rcd 21,493, 21,497 (2001) (Bell Atlantic may not assess IXCs access charges for use of facilities that connect a CMRS provider's network to Bell Atlantic's network because "those facilities are not common lines for purposes of the access charge rules"); *Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1*, 6 FCC Rcd 4794, 4794-95 (1991) (Bell Atlantic may not "assess end user or carrier common line charges" to an IXC for the use of the facility connecting a CMRS carrier to Bell Atlantic).

full amount of access charges, including the access provided by the CMRS carrier. Furthermore, these cases involve only carriers subject to Part 69 of the agency's rules. Indeed, the Commission's decisions in these cases turned on the interpretation of key terms employed in Part 69, such as "end user" and "common line" charges.[44] The Commission made clear in the *Seventh Report and Order* that CLECs, however, are not subject to the restrictions of Part 69, purposefully deciding to keep CLECs free of the "full panoply" of ILEC access charge regulation.[45]

6. *The Seventh Report And Order* Did Not Limit The Applicability Of Tariffed Access Charges To Situations In Which The CLEC Provides Access Directly And Exclusively To The Calling Party.

After establishing the level of the CLEC tariff benchmark, the *Seventh Report and Order* addressed implementation of the benchmark.[46] The *Order* made clear that the rate would apply to both originating and terminating access charges, including 8YY traffic,[47] and that CLECs with rates lower than the benchmark would not be permitted to raise their rates to the new benchmark level.[48] In addition, the *Order* imposed a "market-presence" condition on the availability of the new benchmark rate: it authorized CLECs to charge that rate "only in *the markets* where they have operations that are actually serving end-user customers on the effective date of these rules."[49]

---

[44] *Texcom*, 16 FCC Rcd at 21,497.

[45] *Seventh Report and Order*, 16 FCC Rcd at 9970.

[46] *Id.* at 9941-49.

[47] *Id*. at 9946.

[48] *Id.* at 9947.

[49] *Id*.

The Commission designed this last limitation to prevent CLECs from relying on the benchmark rate, which was meant to be a "transitional mechanism" to "wean competitive carriers off of their dependence on tariffed, supra-ILEC access rates,"[50] to enter new markets when such entry would not otherwise be economically efficient. The Commission believed it was "the historical ability of CLECs to tariff access rates well above the prevailing ILEC rate [that] may have contributed to economically inefficient market entry by certain CLECs."[51] Seeking to avoid such market-distorting entry in the future, the Commission thus limited the availability of the tariff to CLECs' then-existing markets: if a CLEC had, at the time that the new access rules became effective, served end-users customers within a particular metropolitan statistical area ("MSA"), then it was free to tariff the benchmark rate in that MSA.[52]

The Commission did *not*, however, restrict the applicability of the benchmark to those calls in which the originating party was the CLEC's own local telephone service customer.[53] The reference to "end-user customers" in paragraph 58 simply goes to the question of whether a CLEC has offered and is providing local exchange service to retail customers in the relevant MSA; if the answer to that question is yes, then the CLEC is qualified to offer the tariff throughout that MSA, whether access is solely or jointly provided. Indeed, elsewhere in the

---

[50] *Id.*

[51] *Id.*

[52] *Id.* at 9947-48 ("[W]e restrict the availability of the transitional benchmark rate to those metropolitan statistical areas (MSAs) in which CLECs are actually serving end-users on the effective date of these rules."). As noted *infra* text accompanying notes 56-57, this language does not require that the end-users who are served by the CLECs be the CLEC's own retail customers. In this case, however, US LEC undoubtedly passed the "market presence" test – that is, it offered and provided service to its *own* customers – in all of the MSAs to which its joint provisioning agreements applied.

[53] For the same reasons that the Commission could not have adopted a rule prohibiting CLEC/CMRS joint provisioning agreements, *see supra* note 37, it also could not have promulgated a regulation restricting the applicability of the tariff to this context.

Order, the Commission explained that paragraph 58 permitted CLECs to employ the benchmark "for those *areas* where they have *previously offered service*"[54] – not solely for their own end-user customers. Similarly, the language of the relevant rule itself makes clear that it operates simply to prohibit a CLEC from filing a tariff in markets in which it had no prior presence.[55] It *nowhere* states that, in MSAs where the CLEC did have the requisite market presence and thus could legally tariff its access charge rates, the CLEC could not jointly provision the access provided under that tariff or that the CLEC was required to provide *all* elements of access to end-users within the MSA. Nor does the *Order* or the rule suggest that the "end-user customers" in question (here, the parties placing an 8YY call) could only be the retail customers of the CLEC itself, as opposed to those of the entity with whom the CLEC is providing joint service (in this case, the end-user customers of the CMRS provider).[56] Paragraph 58's failure to refer specifically to a CLEC's own end users is all the more significant given that, as indicated elsewhere in the *Order*, the Commission knows how to do so when it wants to.[57]

Thus, the applicability of the benchmark rate depends not upon a case-by-case analysis of the existence of an exclusive, direct access relationship between the CLEC and the calling party (thus eliminating all jointly provisioned access from the tariff system), but rather upon a market-

---

[54] *Seventh Report and Order*, 16 FCC Rcd at 9944 (citing 9947-48) (emphasis added).

[55] 47 C.F.R. § 61.26(d)("[I]n the event that, after June 20, 2001, a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, *the CLEC shall not file a tariff* for its interstate exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC." (emphasis added)).

[56] In either situation, the CLEC is serving end-user customers by providing exchange access, or elements thereof, for outbound 8YY calls.

[57] *See Seventh Report and Order*, 16 FCC Rcd at 9963 (inquiring whether to adopt a rule "only for those CLECs that carry exclusively *their* end users' 8YY traffic" (emphasis added)).

by-market analysis of a CLEC's presence in the market for local exchange service.[58] Of course, the former approach would render the entire tariff scheme unworkable – the applicability of a tariff would vary from customer to customer, rather than from MSA to MSA, as intended. Such a scheme would lack the threshold level of uniformity necessary for a reasonably administrable tariff scheme.

Nor does the Commission's definition of "interstate switched exchange access services" limit the applicability of the benchmark to situations in which the CLEC itself provides each and every element of access. The governing rule provides that such services "shall include the functional equivalent of the ILEC interstate exchange access services typically associated with" specific rate elements.[59] In the case of joint provisioning, each of the listed elements is indeed provided to the IXC, as required by the rule. The elements simply are provided on a joint basis,

[58] Paragraphs 38 and 39 of the *Seventh Report and Order* simply discuss, in broad theoretical terms, the dynamics of the markets implicated by CLEC access charges. *See id.* at 9938 ("In analyzing the problems surrounding CLEC access charges, it is important to recognize that, in their provision of access services, competitive carriers actually serve two distinct customer groups.). First, the Commission explained, CLECs provide access service to IXCs, a market in which CLECs hold "monopoly power." *Id.* Second, CLECs enable their own end users to place and receive long distance calls; these customers, however, have other choices for service. *Id.* These observations undergirded the Commission's general decision to adopt a tariff benchmark mechanism, and thus to "constrain the extent CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access customers" but "abstain entirely from regulating the market in which end-user customers purchase access service." *Id*.

In FCC parlance, these are "historical observations." *AT&T Corp. v. FCC*, 349 F.3d 692, 703 (D.C. Cir. 2003). They discuss certain market facts and market dynamics as justification for the benchmark system. They are not phrased as restrictions and they do not even purport to place any additional conditions on the availability of the benchmark rate. Furthermore, the Commission's "monopoly" theory actually supports application of the benchmark to the situation at hand: when the customer of a particular CMRS carrier places an outbound 8YY call, the CMRS carrier has sole and ultimate control over the delivery of that call to the IXC's 8YY customers, and the IXC has no "choice" other than that CMRS carrier for the interconnection of that call to its final destination. In other words, CMRS carriers wield as much "monopoly power" here as CLECs do in the situations described in the *Seventh Report and Order*.

[59] *See* 47 C.F.R. § 61.26(a)(3) (2003) ("'Interstate switched exchange access services shall include the functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching.").

consistent with the rule, which never provides that the services must be rendered exclusively by the CLEC to come within the definition. Indeed, the joint provision of access by CLECs and CMRS carriers is the "functional equivalent" of traditional ILEC access services: at the end of the day, every single element of access necessary to deliver the CMRS-originated call to the called party is provided to the IXC, and the call is thus interconnected with the IXC's paying 8YY customer. Furthermore, in adopting this definition of "interstate switched exchange access services," the Commission surely did not mean to overrule, without saying so, its precedents approving the joint provision of access by CLECs and other carriers, including wireless carriers.[60] But that would be the inescapable – and implausible– implication of any reading of the definition that requires the CLEC itself to provide every listed element of access.

D. <u>The Commission Has Made Clear That CMRS Providers May Seek To Recover Access Charges By Market-Based Means Such As Private Contracts.</u>

CMRS carriers offering exchange access provide a valuable service and are entitled to compensation for such service even outside a joint billing arrangement.[61] Nothing in the Commission's rules prohibits CMRS carriers from seeking such compensation.[62] Quite the contrary, the Commission recently affirmed that "neither the Communications Act nor any Commission rule prohibits a CMRS carrier from attempting to collect access charges from an

[60] *See supra* Part I.A.

[61] *See supra* Part I.B.

[62] In a proceeding commenced to examine the interconnection of CMRS networks with other networks, the FCC considered the interconnection arrangements between wireless and long distance carriers. *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd. 5020, 5074-76 (1996). The FCC tentatively concluded that CMRS carriers "should be entitled to recover access charges from IXCs, as the LECs do when interstate interexchange traffic passes from CMRS customers to IXCs (or vice versa) via LEC networks." *Id.* at 5074-75. The Commission has not yet concluded that proceeding.

interexchange carrier."[63] In particular, in a declaratory ruling proceeding on referral from a federal district court, the FCC held that CMRS providers are entitled to seek access charges for the exchange access services they provide and to memorialize their right to recover such charges in privately negotiated, market-based contracts, because "[i]n a detariffed, deregulated environment such as this one, carriers are free to arrange whatever compensation arrangement they like for the exchange of traffic."[64] Nowhere in that ruling did the Commission so much as hint that CMRS carriers could contract only with a particular type of service provider. And the D.C. Circuit recently emphasized that a CMRS carrier "is free to file a complaint under 47 U.S.C. § 208 seeking redress for alleged unjust and discriminatory practices" based on an IXC's refusal to pay the access charges it owes. The court thus made clear that CMRS carriers, while detariffed, are entitled to acquire and enforce contractual rights to recover access charges.[65]

Not only did the *Sprint* decision in no way suggest that CMRS carriers may not provide access jointly with LECs, the opposite actually is true. *Sprint* distinguished the situation presented in that case, where the CMRS carrier had attempted to bill the IXC directly, from the situation considered in the *LEC-CMRS Interconnection NPRM*, where the CMRS carrier and the IXC were exchanging traffic indirectly through a LEC.[66] In the latter proceeding, the

---

[63] *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13,192, 13,195 (2002) (Declaratory Ruling) ("*IXC-CMRS Access Charge Declaratory Ruling*").

[64] *Id.*

[65] *AT&T Corp. v. FCC*, 349 F.3d 692, 703 (D.C. Cir. 2003).

[66] *See IXC-CMRS Access Charge Declaratory Ruling*, 17 FCC Rcd at 13,196 n.29 ("The Commission's tentative conclusion was limited to situations in which the IXC and the CMRS carrier are indirectly interconnected and exchange traffic through a LEC.").

Commission explicitly recognized that LECs and CMRS providers would enter contracts setting forth the terms for joint arrangements for providing interstate access.[67]

E. Joint Billing Agreements Between CMRS Providers And CLECs Have Long Been Standard Industry Practice And Serve Legitimate Business and Public Interests.

Since passage of the Telecommunications Act of 1996, many CMRS providers and CLECs have entered into access-sharing arrangements, consistent with their understanding that the Commission's rules and policies permit such contracts. Indeed, CLECs such as US LEC have filed tariffs, without objection from either the Commission or IXCs, that expressly recognize the possibility of carrier-to-carrier agreements on joint provisioning that are not based on other tariffs.[68]

Pursuant to such an agreement, US LEC has been providing access services that connect wireless end users to IXCs since 1997,[69] and many other CLECs have confirmed on the record that they too provide such services.[70] Wireless carriers such as AT&T Wireless, AirTouch, GTE, Bell Atlantic Mobile, and others have all entered into access agreements with CLECs. Many of these agreements – indeed all those of Verizon Wireless – were entered into prior to the Commission's rulings in both the 2001 *Seventh Report and Order* on CLEC access charges and

---

[67] *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5074-76 (1996).

[68] See US LEC Corp., *Rates, Rules, and Regulations Governing the Provision of Switched Access Services For Connection to Interstate Communications Facilities*, Tariff F.C.C. No. 1, at 7 (Sept. 15, 1998) ("All services or commitments undertaken by the Company, and provided through the use of facilities and/or services acquired from another carrier, are subject to any limitations set out in applicable tariffs filed by the other carriers or in *carrier-to-carrier agreements*, and such limitations are hereby incorporated by reference." (emphasis added)).

[69] *See Ex parte* presentation of US LEC Corp., CC Docket Nos. 96-262, 01-92, at 3 (Oct. 3, 2003).

[70] *See Ex parte* presentation of McLeod USA Telecommunications Services, Inc., CC Docket Nos. 01-92, 96-262 (Dec. 15, 2003); *Ex parte* presentation of TelePacific Corp., CC Docket Nos. 01-92, 96-262 (Sept. 22, 2003); Comments of McLeod USA Telecommunications Services, Inc., CC Docket No. 01-92 (filed Oct. 18, 2002); Comments of Focal Communications Corporation, CC Docket No. 01-92 (filed Oct. 18, 2002); Comments of Cavalier Telephone, CC Docket No. 01-92 (filed Oct. 18, 2002).

the 2002 *CMRS Access Charge Declaratory Ruling*. The CMRS-CLEC joint provisioning arrangements therefore cannot reasonably be seen as an effort to "contract around" the Commission's pronouncements.

These arrangements, now standard industry practice, involve significant dollar amounts for all parties concerned. Under these agreements, CMRS carriers and CLECs jointly provide the originating access services, including the radio frequency spectrum equivalent of the "local loop," local switching, interoffice transport, an 8YY data dip, and, in some cases, transport to an IXC point of presence. In addition to the joint provisioning of access, these agreements often include other terms, such as provision by the CLEC of T-1s or other wholesale services at discounted rates.

These agreements have helped to stimulate competition in the access market by eroding the ILEC monopoly on the transport of originating 8YY traffic. IXCs have also enjoyed the benefits of these arrangements by charging their customers for wireless-originated 8YY traffic. The overall tariffed charge for these originating access services is limited under the *Seventh Report and Order* to the benchmark rate (which was 2.5 cents per MOU at its peak and has now declined to at or near the level of the ILEC rate). IXCs, however, charge their 8YY customers up to 10 cents per MOU or more for incoming 8YY traffic.[71] Every minute of traffic delivered by these arrangements generates additional profits for the IXCs. IXCs have paid these access charges without protest in the past and have undoubtedly incorporated those charges into their past 8YY rates.

---

[71] *See* http://www.shop.att.com/wrapper2?portal=shopatt&bannerid=NTD026TXTHP&product=shopatt_er800 (visited Jan. 4, 2004). Even AT&T's "standard low rate" for 8YY calls for business customers is 6.9 cents per minute, *plus* $10 per month, *plus* an additional access charge recovery fee of $3.35 per month, *plus* a 2.44% regulatory, tax, and administrative fee, *plus* a 8.7% universal connectivity charge. *See* http://businessesales.att.com/products_services/tollfreeproduct_catalogdisplay.jhtml (visited Jan. 7, 2004). The delivery of additional traffic to AT&T at a cost of 2.5 cents per minute generates substantial incremental profits for AT&T.

II.
ANY CHANGES IN THE COMMISSION'S RULES OR POLICIES MUST BE LIMITED TO PROSPECTIVE, NOT RETROACTIVE, EFFECT.

This backdrop makes plain that the industry practice of CMRS-CLEC joint billing or revenue-sharing arrangements is perfectly lawful under existing access charge rules and policies. If the Commission elects to change or qualify the standards for such arrangements, however, several independent bodies of law oblige it to change course only prospectively. And any Commission decision that does not *squarely foreclose* the possibility of retrospective relief would only invite costly and burdensome litigation over the terms and conditions of the CMRS-CLEC joint provisioning contracts and tariffs, thereby causing significant harm to those entities that provide the best hope for sustained competition in both the local exchange and exchange access markets.

A. The Communications Act Precludes Any Retroactive Invalidation Of Tariffed Access Charges.

Should the Commission decide as a matter of policy to forbid joint billing arrangements between CLECs and CMRS carriers, the "filed rate" doctrine, derived from Section 203 of the Communications Act, limits the Commission to the promulgation of an exclusively forward-looking rule. That well-settled doctrine instructs that, when a common carrier files with a regulatory agency a tariff that sets the rates for, and terms of, its service, the tariffed rate is the *sole* rate that lawfully may be charged for the service. "'[T]he rate the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.'"[72] In other words, "any 'filed rate' – that is, one tariffed with the governing regulatory agency – is per se reasonable

[72] *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)); *see also Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 416-17 (1986) ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.").

and unassailable in judicial proceedings brought by ratepayers."[73] The filed rate doctrine is equally applicable regardless of whether a challenge is styled as an attack on a tariff or on the services provided pursuant to a tariff.[74] The doctrine promotes finality and uniformity by guaranteeing that the rates lodged with the Commission cannot lawfully be modified – either by service providers acting unilaterally, or by courts or other governmental entities.[75]

Under the filed rate doctrine, CLECs were legally *required* to charge the tariffed rate for access charges. They were prohibited by law from charging some other, purportedly more "reasonable," rate for the joint provision of access.[76] In point of fact, as detailed above, the Commission never issued any benchmark rates for individuated access elements, and CLECs thus could not possibly have been required to file tariffs or charge particular fees for separate elements of access. Thus, any notion that CLECs in the past should have charged some rate *other than* the then-prevailing tariffed rate is foreclosed by the filed rate doctrine. Such a proposition would constitute a direct attack on the tariffed rate itself, casting into doubt the past conduct of numerous CMRS providers and CLECs who operated pursuant to joint provisioning agreements, and upsetting the strong interest in finality that the doctrine is designed to protect.

Any determination that a CLEC erred in charging the "per se reasonable" tariffed rate necessarily would require the Commission (in the context of a Section 208 proceeding) or a reviewing court (in the context of litigation) to determine the rate that should have been charged. But the filed rate doctrine would be offended by any judicial action that rejected as valid the rate

---

[73] *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994).

[74] *See AT&T*, 524 U.S. at 223.

[75] *See id*.

[76] *See* 47 U.S.C. § 203(c)(1) (2000) (providing that "no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for [interstate wire or radio] communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect").

on file at the time access charges were assessed. It is not the function of the courts "to determine what the reasonable rates during the past should have been," nor do they have the expertise necessary to do so.[77] Inevitably, any effort to challenge the CMRS-CLEC arrangements here "would unnecessarily enmesh the courts in the rate-making process."[78]

An after-the-fact attempt to calculate the "right" rate also would present insurmountable practical difficulties. As the Commission is well aware from its general experience with intercarrier compensation, making such calculations is extraordinarily complicated. Here, for instance, there is no dispute that (1) IXCs received a valuable service in the provision of access for 8YY calls placed on wireless networks, were billed for that service, knew or should have known from bills that the calls originated from CMRS customers, and earned financial benefits by receiving an additional profit for each minute of all delivered calls; and (2) both the CMRS carriers and CLECs incurred costs for the provision of service to the IXCs. Accordingly, quite apart from any tariff or even a provisioning agreement, CLECs and CMRS carriers would be entitled to *some* compensation for the benefits they conferred upon IXCs and the costs they incurred in doing so;[79] notably, no party to these proceedings has been so bold as to suggest that the price for the access provided by CLECs and CMRS carriers should be zero. But any effort to establish a new rate retroactively would require the decisionmaker to weigh these competing benefits and burdens and assign them a monetary value, an exceedingly thorny task.

---

[77] *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

[78] *See Wegoland*, 27 F.3d at 19 (citing "the 'attendant complications'" that would arise in a post hoc challenge to a filed rate, "because the court would have to determine a 'hypothetical' reasonable rate in order to determine the difference from the rate actually paid" (citation omitted)).

[79] *See, e.g.*, *Advamtel LLC v. AT&T*, 118 F. Supp. 2d 680 (E.D. Va. 2000) (finding carrier-customer relationship when a carrier is interconnected with another in such a way as to expect to receive access service, and in fact receives those services).

Relatedly, Sections 204 and 205 of the Communications Act limit the Commission to forward-looking action. If the Commission issues any retroactive conclusions about the permissibility of CLEC/CMRS agreements, that would constitute a pro tanto modification of the relevant tariffs themselves. But, under these provisions, the Commission has no authority to impose retrospective liability for access charges that were assessed based on tariffs that were presumptively lawful at the time they were filed. The text of Section 205 could not speak more plainly: "[T]he Commission is authorized and empowered to determine and prescribe . . . the just and reasonable charge . . . to be *thereafter* observed."[80] As the D.C. Circuit has explained, Section 205 "speaks only prospectively."[81]

Nor would Section 204's limited authority to order refunds – an authority that only can be invoked where, unlike here, the Commission has suspended a filed tariff before it goes into effect – be implicated in this case. Again, the statutory text is instructive. By its very terms, Section 204 allows the Commission to order refunds only after suspending a tariff, and to suspend a tariff for no longer than "five months beyond the time *when it would otherwise go into effect*."[82] As the D.C. Circuit has emphasized, "where the Commission has not made the first step, ordering a suspension, it never reaches the last one, ordering a refund."[83] In other words, "when the FCC investigates and remedies an unreasonable rate which it has theretofore permitted to become fully effective without a suspension order," it "has no authority" to order refunds under Section 204.[84] Because the Commission here allowed the tariffs filed by CLECs

---

[80] 47 U.S.C. § 205(a) (2000) (emphasis added).

[81] *Ill. Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1481 (D.C. Cir. 1992).

[82] 47 U.S.C. § 204(a)(1) (emphasis added).

[83] *Ill. Bell*, 966 F.2d at 1481.

[84] *Id*. at 1483.

to go into effect without suspending them, it cannot now order CLECs to return any portion of the access charges to IXCs. Naturally, "this does not mean that the Commission cannot take action to correct" the CLEC tariffs if, at this late day, it finds them unreasonable. "[B]ut it must do so under § 205, which speaks only prospectively."[85] The Commission may not use its general authority to make rules or issue declaratory rulings relating to access charges to evade the specific strictures of Sections 204 and 205.[86]

B. **If The Commission Decides To Invalidate CMRC-CLEC Joint Billing Arrangements, The Due Process Clause's "Fair Notice" Requirement Compels It To Do So Only On A Prospective Basis.**

It is a bedrock principle of constitutional law that a government agency may not hold a regulated entity accountable for falling short of a legal standard, the meaning of which is unclear. As the D.C. Circuit emphasized in *Trinity Broadcasting of Fla., Inc. v. FCC*[87]:

> Because "[d]ue process requires that parties receive fair notice before being deprived of property," we have repeatedly held that "[i]n the absence of fair notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability."[88]

---

[85] *Id.* at 1481.

[86] *See Nat'l R.R. Passenger Corp. v. Nat'l Assoc. of R.R. Passengers*, 414 U.S. 453, 458 (1974) (specific statutory grants trump the general); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796, 802 (D.C. Cir. 2002) (same).

[87] 211 F.3d 618 (D.C. Cir. 2000).

[88] *Id.* at 628 (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)); *see also, e.g.*, *PMD Produce Brokerage Corp. v. USDA*, 234 F.3d 48, 51 (D.C. Cir. 2000) ("The question before the court, however, is not whether the Secretary's interpretation of the Rules of Practice is reasonable, but whether the Secretary has given fair notice of his interpretation . . . ."); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) ("[A] manufacturer cannot be found to be out of compliance with a standard if [the agency] has failed to give fair notice of what is required by the standard."); *Rollins Envt'l Servs. (NJ), Inc. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991) ("Under the due process clause of the Fifth Amendment, a regulation carrying penal sanctions must give fair warning of the conduct it prohibits or requires." (internal quotation marks and citation omitted)); *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) ("[T]he due process clause prevents . . . the application of a regulation that fails to give fair warning of the conduct it prohibits or

More specifically, *Trinity Broadcasting* teaches that the Due Process Clause prohibits an agency from imposing any sort of liability unless, "'by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with *ascertainable certainty*, the standards with which the agency expects parties to conform . . . .'"[89] In cases applying the "ascertainably certain" test, two circumstances have proven fatal to agency efforts to impose penalties for violations of opaque agency pronouncements: (1) the agency's pronouncement is silent on its interpretation of the disputed rule; or (2) past agency statements conflict with the interpretation it subsequently advances.

For example, the *Trinity* court invalidated on due process grounds the Commission's decision to deny a television licensee's renewal application. The court rejected the FCC's claim that its regulation – which granted certain preferences to "minority controlled" broadcasters – provided fair notice that licensees would be required to demonstrate de facto control by minorities, not just a majority-minority board of directors.[90]

The *Trinity* court emphasized the fact that "the agency failed to provide a relevant definition for the key regulatory term – 'minority controlled' . . . ."[91] In other words, simple regulatory silence can create an uncertainty that prevents imposition of liability under the agency's newly articulated standard. The court also pointed to previous Commission orders that, contrary to its new understanding, implied that a majority-minority board was enough to confer

---

requires."); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) ("If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.").

[89] *Trinity Broad.*, 211 F.3d at 628 (quoting *Gen. Elec.*, 53 F.3d at 1329) (emphasis added)).

[90] *See id.* at 632.

[91] *Id*. at 629; *see also id*. at 631 ("Before an agency can sanction a company for its failure to comply with regulatory requirements, the agency 'must have either put this language into [the regulation] itself, or at least referenced this language in [the regulation].'" (quoting *United States v. Chrysler Corp*., 158 F.3d 1350, 1356 (D.C. Cir. 1998)).

"minority controlled" status.[92] These two shortcomings led the D.C. Circuit to conclude that the Commission had not provided the "ascertainable certainty" necessary to hold Trinity Broadcasting to its interpretation of "minority controlled."

The D.C. Circuit reached a similar conclusion in *Satellite Broadcasting Co. v. FCC*.[93] There, the court invalidated the Commission's decision to dismiss a license application for failure to file it in the proper location, finding that the agency's regulation did not clearly indicate where the application should have been submitted.[94] Again, the court concluded that there was no "ascertainable certainty" as to proper filing procedures given the regulation's silence on the correct venue for filing,[95] as well as contradictory Commission rules on where applications should be filed.[96]

Likewise in *PMD Produce Brokerage Corp. v. USDA*,[97] the D.C. Circuit concluded that due process barred the Department of Agriculture from revoking a license after the agency concluded that a 30-day regulatory window for appealing an adverse decision began to run upon an oral ruling from an administrative law judge, and hence had lapsed by the time PMD appealed. The court deemed the regulations ambiguous, not only because of their silence on the

[92] *See id*. at 629-30.

[93] 824 F.2d 1 (D.C. Cir. 1987).

[94] *See id*. at 3-4.

[95] *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995) (emphasizing that, in *Satellite*, "the specific regulation governing the filing of the application was silent on the appropriate location to file").

[96] *See Satellite Broad*., 824 F.2d at 2, 3 (citing the "conflict" among various Commission rules).

[97] 234 F.3d 48 (D.C. Cir. 2000).

critical question,[98] but because oral statements and letters by agency officials contradictorily had implied that the limitations period ran only upon the party's receipt of a written order.[99]

The Court of Appeals followed the same approach in *United States v. Chrysler Corp.*,[100] ruling that the Due Process Clause prevented the National Highway Traffic Safety Administration from ordering a recall of a vehicle under a safety standard where it had failed adequately to explain what that standard required.[101] The agency never indicated expressly how it would interpret its safety standard,[102] and its past conduct evinced an understanding of the regulation at odds with the one it later sought to enforce.[103]

Finally, in *General Electric Co. v. EPA*,[104] the D.C. Circuit repudiated the EPA's effort to penalize a company that failed to comply with an ambiguous regulation regarding the disposal of highly toxic chemicals. General Electric was fined after it distilled used solvents and incinerated only the contaminated portion, since the agency asserted that its regulation required the immediate incineration of the entire solution. The D.C. Circuit ruled that the EPA's regulation failed to provide General Electric with "ascertainably certain" notice of what was required of it. As in *Trinity* and *Satellite*, the absence of a rule or combination of rules providing notice helped

[98] *See id*. at 53 (emphasizing that "the Secretary's Rules of Practice are silent" on the agency's interpretation of the disputed regulation, and concluding that "PMD could not simply read the Rules of Practice and know" how the agency had construed it).

[99] *See id*. at 53-54.

[100] 158 F.3d 1350 (D.C. Cir. 1998).

[101] *See id*. at 1357.

[102] *See id*. at 1356 ("NHTSA must have either put this language into Standard 210 itself, or at least referenced this language in Standard 210.").

[103] *Id*. ("[A]n agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation of a regulation.").

[104] 53 F.3d 1324 (D.C. Cir. 1995).

render the agency's action fatally infirm.[105] Also significant were EPA regulations that condoned the practice that the agency now condemned,[106] as well as the agency's "difficulty even identifying which portion of" its rules barred General Electric's conduct.[107] "Such confusion," the court confessed, "does not inspire confidence in the clarity of the regulatory scheme."[108]

For the reasons explained above, Verizon Wireless believes that the present regulatory regime clearly authorizes CMRS carriers and CLECs to enter into joint provisioning or single billing arrangements for the provisioning of originating access to IXCs, and that the CLEC benchmark fully applies in such circumstances (assuming the CLEC has met the "market presence" test). But to the extent that the Commission disagrees, the Due Process Clause obliges it to limit any contrary interpretation to purely prospective effect. The Commission's previous regulations, orders, and rulings reasonably can be read to endorse CMRS-CLEC contracts, and the Commission certainly never has prohibited them. The Commission thus has failed to provide the constitutionally imperative "ascertainably certain" notice of what its rules require, and accordingly may not retroactively penalize any regulated entity for entering into such contracts.[109]

---

[105] *Id*. at 1330 ("On their face, the regulations reveal no rule or combination of rules providing fair notice that they prohibit pre-disposal processes such as distillation.").

[106] *Id*. at 1331 ("Not only do the regulations fail to clearly bar distillation, they apparently permit it.").

[107] *Id*. at 1332.

[108] *Id*.

[109] Even if the Commission does not now impose a direct penalty on parties to joint billing arrangements, any determination that the access charges were unlawful still would work an unconstitutional "deprivation" within the meaning of *Trinity*. This is so because such a finding necessarily would abrogate CMRS carriers and CLECs' contract rights, thereby depriving them of "property" within the meaning of the Fifth Amendment. *See, e.g*., *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982) (defining "'property' for purposes of the Due Process Clause . . . to include rights which at common law would have been deemed contractual"). In addition, any finding of unlawfulness could form the basis of forfeiture proceedings against CMRS carriers or CLECs, *see* 47 C.F.R. §

No less than in *Trinity* and its progeny, the Commission's past regulations, orders, and rulings here are *at most* silent on the crucial question: whether CLECs lawfully may enter into joint billing arrangements with CMRS providers. Nothing in the *Seventh Report and Order*, or any other Commission statement, so much as implies, much less states explicitly, that CMRS-CLEC joint billing arrangements are unlawful. A regulated entity could read the *FCC Record* cover to cover without discovering with "ascertainable certainty" that the Commission has prohibited such contracts.[110] "On their face," the Commission's statements "reveal no rule or combination of rules providing fair notice that they prohibit" CMRS-CLEC joint billing arrangements.[111] Regulated entities cannot now be penalized for the Commission's failure to articulate any such interpretation explicitly.

"Not only do the regulations fail to clearly bar" CMRS carriers and CLECs from entering joint billing arrangements, "they apparently permit it."[112] Again, paragraph 55 of the *Seventh Report and Order* does not limit CLEC access charges to particular elements or require any set-off for access services provided by ILECs, nor does paragraph 58 do anything more than simply condition the applicability of a tariff in a particular MSA on the competitive presence of a CLEC in that MSA as of the *Order*'s effective date. Indeed, paragraph 56 states unconditionally that

---

1.80(a) (2003), resulting in the imposition of fines of up to $120,000, *see id*. § 1.80(b)(2). Such a finding also could form the basis of private lawsuits for money damages by IXCs. Because any determination that joint billing arrangements violated the Communications Act or FCC rules would deprive CMRS carriers and CLECs of their contract rights, and in the future could expose them to Commission fines and money damages, it would constitute a present-day "deprivation." *Cf. MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001) (finding a present violation of the Due Process Clause when future application of a Commission rule could cause broadcast licensees to lose their licenses).

[110] *Cf. PMD Produce Brokerage Corp. v. USDA*, 234 F.3d 48, 53 (D.C. Cir. 2000) (emphasizing that "the Secretary's Rules of Practice are silent" on the agency's interpretation of the disputed regulation, and concluding that "PMD could not simply read the Rules of Practice and know" how the agency had construed it).

[111] *Gen. Elec.*, 53 F.3d at 1330.

[112] *Id.* at 1331.

the benchmark applies to originating and terminating access charges, including 8YY traffic, and, whereas paragraphs 64 through 81 carve out an exemption for rural CLECs, there is no such exemption for the charges at issue here. Paragraphs 98 through 104 even put out for further comment the propriety of revenue-sharing agreements between CLECs and other entities that aggregate 8YY traffic. The Sprint PCS Declaratory Ruling made clear that CMRS carriers, while not entitled by any federal rule or tariff automatically to assess access charges, may enter into private contracts in order to recover such charges – and nothing in that order purported to limit the types of service providers with which CMRS carriers may contract. The Commission has even specifically acknowledged the existence of LEC-CMRS joint access arrangements without suggesting they are in any way improper.[113]

Had the *Seventh Report and Order* meant to prohibit these arrangements, it would have had to either provide benchmarked rates for each individual element of access provided by a CLEC, or set forth some system for off-setting individual access element charges provided by another carrier – including both ILECs and CMRS carriers. But it took none of these actions. As US LEC points out, numerous CLECs filed tariffs after the *Seventh Report and Order* that charge the benchmark rate for joint provision of access, without protest from the Commission or IXCs.[114] Indeed, the very fact that these proceedings are underway is evidence that the Commission's past regulations, orders, and rulings did not unambiguously proscribe CMRS-

---

[113] *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5075 (1996) ("We also invite CMRS providers and LECs to describe existing arrangements under which CMRS providers are compensated for originating and terminating interstate interexchange traffic that transits a LEC's network.").

[114] *See supra* note 68 (quoting US LEC Tariff).

CLEC joint provisioning arrangements. Qwest's petition for "clarification, or in the alternative, reconsideration," effectively concedes as much.[115]

Under these circumstances, the Commission would be "hard pressed to show fair notice," as the FCC "itself has taken action in the past that conflicts with" the current view of some that CMRS-CLEC contracts should be impermissible.[116] A regulated entity in good faith could have read these various rules and statements and been unable to identify, with "ascertainable certainty," the novel theory advanced here that the CLEC benchmark rate did not apply to CMRS-originated calls and that joint provisioning arrangements were impermissible. Therefore, no liability can attach to the CLEC's decision to charge the benchmark rate, or to the CLEC or CMRS carrier's decision to enter into joint provisioning arrangements.

Nor is it legally relevant that the Commission today may regard the CMRS-CLEC joint provisioning arrangements as inappropriate transactions. The issue is whether, objectively, the Commission provided the parties with "ascertainably certain" notice of what was expected of them. That the parties' subjective intent is immaterial may be seen from *Trinity Broadcasting* itself, in which the D.C. Circuit invalidated an effort to penalize a licensee, despite the Commission's doubt that the licensee was in fact "minority controlled."[117]

In short, the Commission's unambiguous decision to make the CLEC benchmark broadly applicable in existing CLEC markets, coupled with its failure ever to suggest that the CMRS-CLEC contracts at issue are unlawful, combine to deny regulated entities the fair notice required

---

[115] *See supra* note 19 (quoting *Qwest Petition*).

[116] *United States v. Chrysler Corp*., 158 F.3d 1350, 1356 (D.C. Cir. 1998).

[117] *See Trinity Broadcasting of Fla., Inc. v. FCC*, 211 F.3d 618, 624 (D.C. Cir. 2000).

by the Constitution. The Commission now must limit itself to a rule of prospective application.[118]

C. <u>Well-Established Retroactivity Principles Prohibit The Commission From Substituting A New Legal Rule For An Old One, Or From Adopting A Clarification That Would Produce Intolerable Hardships.</u>

Under the doctrine of retroactivity, courts recognize a "'basic distinction'"[119] between two circumstances in which an agency seeks to give retroactive effect to a newly articulated standard. When an agency substitutes "'new law for old law that was reasonably clear,' a decision to deny retroactive effect is uncontroversial."[120] In such a case, "'notions of equity and fairness' militate strongly against retroactive application."[121] By contrast, if an agency adopts "'new applications of existing law, clarifications, and additions,'"[122] "retroactivity will be denied" when applying the standard to past conduct "would work a 'manifest injustice.'"[123]

Here, should the Commission decide to proscribe CMRS-CLEC joint billing arrangements, it must do so on an exclusively forward-looking basis, because creating a federal prohibition on such contracts would constitute an entirely new rule that would displace the agency's past pronouncements on the broad applicability of the benchmark. And, even if the

---

[118] Indeed, the appropriate place, if anywhere, to adopt a new policy would be the Commission's still-pending 8YY rulemaking proceeding discussed supra Part I.C.3. *See Am. Express Co. v. United States*, 472 F.2d 1050, 1055 (C.C.P.A. 1973) (emphasizing that rulemaking, which "is legislative in nature, is primarily concerned with policy considerations for the future rather than the evaluation of past conduct") (citations omitted).

[119] *Williams Nat. Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (quoting *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986)).

[120] *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (quoting *Epilepsy Found. of N.E. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001)).

[121] *Epilepsy Found*., 268 F.2d at 1102 (quoting *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998)).

[122] *Williams Nat. Gas*, 3 F.3d at 1554 (quoting *Aliceville Hydro Assocs.*, 800 F.2d at 1152).

[123] *Verizon*, 269 F.3d at 1109 (quoting *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc)).

Commission's new rule is regarded as a clarification, under the facts here such a proscription would work a manifest injustice and therefore still must be limited to prospective effect.

Well-established precedent teaches that pure prospectivity will attach to an agency adjudication "[i]n a case where there is a 'substitution of new law for old law that was reasonably clear.'"[124] As the D.C. Circuit has explained, such a case implicates basic "questions of fairness," and courts accordingly will "deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule."[125]

Any determination that the CLEC benchmark is inapplicable when CMRS carriers and CLECs jointly provision access for 8YY calls and that contracts for such provisioning are illicit would mark a sharp departure from the Commission's previous statements regarding the benchmark rate.[126] Once more, paragraph 55 of the *Seventh Report and Order* authorizes CLECs to file under the benchmark rate for *all* elements of access, regardless of which elements they actually provide and whose customers the end-users are; paragraph 56 states in no uncertain terms that the benchmark rate governs all originating and terminating access charges, including those generated by 8YY traffic; the sole exemption from the benchmark is for rural LECS; and paragraphs 98 through 104 solicit further comments on the propriety of revenue-sharing agreements between CLECs and other entities in the specific context of 8YY traffic. The

[124] *Id.* (quoting *Epilepsy Found*., 268 F.3d at 1102).

[125] *Williams Nat. Gas* , 3 F.3d at 1554.

[126] *Cf. Butler v. McKellar*, 494 U.S. 407, 415 (1990)(rule is "new" for purposes of retroactivity in habeas corpus proceeding if its existence under current precedent is "susceptible to debate among reasonable minds"); *Sawyer v. Smith*, 497 U.S. 227, 234 (1990) ("new rule" is one that departs from "`reasonable, good-faith interpretations of existing precedents'")(quoting *Butler*, 494 U.S. at 414). Courts often look for guidance to federal habeas law in deciding retroactivity questions in the administrative law context. *See, e.g., McDonald v. Watt*, 653 F.2d 1035, 1042 (5th Cir. Unit A 1981) (citing *Linkletter w. Walker*, 381 U.S. 618 (1965)).

Commission's decision in the Sprint PCS Declaratory Ruling reaffirmed that CMRS carriers may enter into private contracts to recover access charges from IXCs. Given the fairly apparent nature of these decisions, no carrier until now has ever challenged the propriety of these arrangements before the Commission or the courts.[127] Because Verizon Wireless and the CLECs reasonably relied on this regulatory regime,[128] retroactive application of any new standards here thus would constitute an impermissible attempt to substitute "'new law for old law that was reasonably clear.'"[129]

Courts consistently have analyzed retroactive applications of new rules under due process standards – and have rejected such efforts – even where, as here, the agency's new standard does not formally "overrule" a prior precedent.[130] Informal agency practices can be as binding and authoritative as explicit pronouncements.[131] Thus, even if the Commission concludes that the *Seventh Report and Order* did not expressly hold that the CLEC benchmark was applicable here or that it never formally ruled in favor of CMRS-CLEC joint billing arrangements, the numerous

---

[127] *Cf. Verizon*, 269 F.3d at 1110-11 (finding reliance on agency rule unreasonable because it was "perpetually enmeshed in litigation" and subsequently held by a court to be "mistaken as a matter of law"); *Pub. Serv. Co. of Colorado v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) (finding no reasonable reliance where conduct had been in dispute before agency for 13 years).

[128] *See, e.g.*, *Epilepsy Found.*, 268 F.3d at 1102-03 (requiring prospective effect because "[n]either Borgs nor the Foundation could have known for sure that the established law might change"); *McDonald v. Watt*, 653 F.2d 1035, 1044 (5th Cir. Unit A 1981) (concluding that plaintiffs' reliance was reasonable because the agency's regulation was "at best ambiguous" and the "only administrative interpretations" thereof "strongly indicated" that plaintiffs' conduct was lawful).

[129] *Verizon*, 269 F.3d at 1109 (citing *Epilepsy Found.*, 268 F.3d at 1102).

[130] *See, e.g.*, *McDonald*, 653 F.2d at 1045 n.23 (refusing retroactive application, and "reject[ing] the argument that an adjudicatory body must technically 'overrule' its own prior decision before a limitation of prospectivity may be imposed"); *see also, e.g.*, *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986) (explaining that "the Commission had never before decided" the issue formally, but nevertheless examining whether the agency impermissibly had departed from established practices).

[131] *See Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (inquiring whether the "new rule represents an abrupt departure from a well established *practice*" (emphasis added)).

Commission statements and practices endorsing these contracts nevertheless foreclose retroactive imposition of any new rule.

Moreover, retroactivity would be inappropriate even if the Commission viewed any determination that the benchmark rate should not apply in the context of joint access agreements as a "clarification" of existing law. Imposing that new understanding retroactively would produce intolerable hardships for the service providers that have relied on past Commission regulations, orders, and rulings. "[C]ourts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests."[132] Retroactivity is disfavored – and a "robust doctrinal mechanism" exists to curtail its use[133] – precisely because it can frustrate "the expectations of those who have justifiably relied on a prior rule."[134]

In *Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB*,[135] the D.C. Circuit articulated a five-factor test that counsels against the imposition of retrospective liability here:

> Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[136]

---

132 *Id.*

133 *Verizon*, 269 F.3d at 1109.

134 *McDonald v. Watt*, 653 F.2d 1035, 1044 (5th Cir. Unit A 1981).

135 466 F.2d 380 (D.C. Cir. 1972).

136 *Id.* at 390; *see also, e.g.*, *Cassell v. FCC*, 154 F.3d 478, 486 & n.6 (D.C. Cir. 1998); (applying *Retail, Wholesale* test); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (same).

The "first impression" factor – which reflects a perceived need to offer financial incentives to encourage judicial or administrative proceedings that result in new rules[137] – is inapplicable in matters, such as this one, that were initiated by the party that faces liability. This is not a standard case where an aggrieved entity hauls a recalcitrant alleged wrongdoer before a tribunal. Instead, US LEC – which faces potentially massive financial liability should the Commission invalidate its contracts – raised the issue with the Commission by seeking a declaratory ruling. In short, there is no need to offer IXCs money damages as an inducement to initiate legal proceedings, as the proceedings were initiated by a CLEC on the other side of the bar. Money damages also would be inappropriate because they would reward IXCs that benefit from using CMRS and CLEC networks without paying their owners for access.[138]

The second *Retail, Wholesale* consideration – whether the agency has abandoned an established policy – likewise suggests the impropriety of imposing any new standard retrospectively. As explained above, any Commission finding that joint billing arrangements are unlawful would mark a sharp departure from its previous official decisions regarding the applicability of the benchmark and endorsement of these contracts. Even characterizing any Commission decision in these proceedings as a "clarification," there is no denying that such a decision would upset numerous past transactions, now long closed, and throw the validity of many current contracts into doubt. Thus, in this context, any "mere clarification" of the *Seventh Report and Order* would still have major practical and detrimental consequences, opening both the Commission and the industry up to colossal uncertainty about not just the reasonableness of

---

[137] *See Retail, Wholesale*, 466 F.2d at 390.

[138] *Cf. AT&T Corp. v. FCC*, 349 F.3d 692, 703 (D.C. Cir. 2003) (remarking "that [a CMRS carrier] is free to file a complaint under 47 U.S.C. § 208 seeking redress for alleged unjust and discriminatory practices" based on an IXC's refusal to pay access charges).

past rates for CLEC access charges but future rates as well, and thus creating the sort of adverse and unfair effect on regulated entities that the retroactivity doctrine is meant to prevent.

Third, retroactivity is unwarranted because, in reliance on the broad applicability of the benchmark and the Commission's endorsement of joint provisioning arrangements, service providers across the country have entered into numerous joint provisioning contracts premised on the availability of the benchmark rate. The Commission expressly has acknowledged as much, without so much as hinting that such arrangements are improper, let alone promulgating a binding regulation to prohibit them.[139] The monetary value of these contracts is also noteworthy. Retroactive abolition of these contracts would work a severe disruption to the settled, investment-backed expectations of CMRS carriers and CLECs. Given that IXCs knew or should have known of the originating source of the calls, there is no possible "equitable" basis for upsetting these expectations.

Fourth, retroactivity would impose an enormous burden on regulated entities by potentially exposing CLECs and their contractual partners to lawsuits for money damages by disgruntled IXCs. Courts recognize that the retroactive imposition of money damages or fines is particularly odious.[140] For this reason, the D.C. Circuit has indicated that, even if parties are made to pay damages stemming from their reliance on discarded policies, they nevertheless may be "entitled to some kind of equitable offset in light of such reliance."[141]

---

[139] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5075 (1996) ("We also invite CMRS providers and LECs to describe existing arrangements under which CMRS providers are compensated for originating and terminating interstate interexchange traffic that transits a LEC's network.").

[140] *NLRB v. Majestic Weaving Co.*, 355 F.3d 854, 860 (2d Cir. 1966); *see also Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1084-85 (D.C. Cir. 1987) (en banc) (concluding that the burden of retroactive application was minimal, in part because "'[n]or are fines or damages involved here'" (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974))).

[141] *Verizon Tel. Cos.*, 269 F.3d at 1112.

Finally, retroactive liability would not advance the purposes of the Communications Act. In fact, retroactivity may actually *undermine* the Act's purposes, which include ensuring the effective provision of communications services and fostering vigorous competition among service providers.[142] Retrospectively abrogating CMRS-CLEC contracts would call into question the reciprocal rights and responsibilities of telecommunications providers across the country, spawning time-consuming and costly litigation that could drive providers out of business and cause disruptions in service. Similar concerns impelled the Fifth Circuit in *McDonald v. Watt*[143] to refuse to grant retroactive effect to an Interior Department adjudication. "[T]he effect of retroactivity is to cloud title to hundreds of issued leases," the court reasoned, which in turn "threatens a disruption of the entire statutory leasing program for the sake of a new interpretation of an ambiguous and inconsistently implemented regulation."[144] Here, as in *McDonald*, "[r]ather than advancement of the statutory purpose through retroactive application of [the new standard], we can see only its frustration."[145]

Perhaps in recognition of these concerns about the untoward effects of retroactivity, the Commission in the past has limited its implementation of new policies, initiatives, or standards to future effect – in some cases going so far as to phase in a prospective rule over a period of time. For instance, the Commission has followed this approach in the Intercarrier Compensation[146] and

---

[142] *See, e.g.*, 47 U.S.C. § 151 (2000); *id*. § 160(b).

[143] 653 F.2d 1035 (5th Cir. Unit A 1981).

[144] *Id.* at 1046.

[145] *Id*.

[146] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9156-57, 9186-87 (2001) (Order on Remand and Report and Order) (Because the Commission believed it prudent to avoid "a market-disruptive 'flash cut'" that would "upset the legitimate business expectation of carriers and their customers," the Commission "adopt[ed] a gradually declining cap on the amount that carriers may recover from other carriers for delivering ISP-bound traffic").

Triennial Review[147] proceedings – and indeed elsewhere in the Access Charge Reform matter.[148] It should do likewise here, and make explicit that any exemption to the benchmark rate or prohibition on CMRS-CLEC joint provisioning agreements will be applied only prospectively.

In short, as the D.C. Circuit emphasized in *Retail, Wholesale*, "[u]nless the burden of imposing the new standard is *de minimis*, . . . the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude [a new agency policy's] retroactive effect."[149] The same is true here. If the Commission chooses to change course and now either carve out an exemption from the benchmark for access jointly provisioned by CMRS carriers and CLECs or to condemn the CMRS-CLEC joint access arrangements that previously were regarded as licit, the law requires it to do so only on a prospective basis.

CONCLUSION

As demonstrated above, a rational review of the Commission's regime for CLEC and CMRS intercarrier compensation indicates that joint provisioning arrangements were and are affirmatively permissible. The Commission's regime clearly evinces a preference for joint billing arrangements, sets a single, non-disaggregated benchmark rate for CLEC access charges,

---

[147] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, 17137, 17139 (2003) (Report and Order and Order on Remand and Further Notice of Proposed Rulemaking) (Because "a number of competitive LECs [had] relied on the existence of line sharing," the Commission "avoid[ed] a 'flash cut' to a new compensation regime" and established a three year transition period for new line sharing arrangements, which gave CLECs "adequate time to implement new internal processes and procedures…and negotiate new arrangements").

[148] *See Seventh Report and Order*, 16 FCC Rcd at 9925, 9937, 9948-49 (In order to "avoid too great a disruption to competitive carriers," and because the Commission was "reluctant to flash-cut CLEC access rates," the Commission determined "on a prospective basis" that "a more gradual transition is appropriate so that the affected carriers will have the opportunity to adjust their business models").

[149] *Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 392 (D.C. Cir. 1972).

applies that rate to 8YY traffic and makes it rate available throughout a MSA so long as the CLEC has previously offered service in that area, subject only to a rural CLEC exemption, and unambiguously provides that CMRS carriers are free to negotiate and consummate private agreements to secure access charges. Thus, under the Commission's regulations, orders, and rulings, CLECs and CMRS carriers were legally entitled to enter into agreements for the dual provision of access to IXCs at the CLEC's benchmarked rate.

At a bare minimum, however, CLECs and CMRS carriers acting in good faith certainly had no reason to believe that the Commission may view such agreements as legally infirm. Thus, should the Commission now determine that joint access agreements should be prohibited or conditioned, the Communications Act and the Constitution require it to limit such a prohibition to purely prospective effect. In the interest of avoiding an eruption of litigation and proceedings at the Commission, and a consequent disruption of both CLEC and CMRS competition with ILECs in the local exchange and exchange access markets, the Commission must clearly specify that any regulatory decision it makes is of purely prospective effect.